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Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of ‘Democratic Society’

1. Introduction

When one examines the current place of democracy in the political discourse surrounding the European Court of Human Rights (hereafter, the Court), one is struck by how drastically it has changed since the Court’s early days. Legal historians are clear that democracy played a significant role in supporting the creation of the Convention nascent system: early civil society activists and politicians aimed to install an intergovernmental ‘alarm bell’¹ system against the return of totalitarian practices while drafting states aimed to ‘lock up’² the democratic process against internal opponents. Article 2 of the first draft of the European Convention on Human Rights (hereafter, the Convention) prepared by the European Movement in 1948 (before it reached the legislative and executive levels of the Council of Europe (hereafter, the CoE)) required each state party ‘faithfully to respect the fundamental principles of democracy’ and to proscribe any action ‘which would interfere with the right of political criticism and the right to organise a political opposition’.³ In schematic terms, the preservation of democracy was the end and the Convention ‘system’ the means.

Today, the political discourse has significantly changed. In a number of state parties (including early promoters of the Court’s system such as the United Kingdom⁴), democracy is increasingly employed as a normative standpoint to criticize the Court’s adjudication. On this view, the Court has excessively extended its role of final interpreter of the Convention (based on Article 32 ECHR). This has led not only politicians but also academics and national judges to question the legitimacy of the Court’s authority. A senior judge of the United Kingdom even questioned the very existence of the Court: ‘if one accepts, as I have so far argued, that

¹ For the non-governmental group the ‘European Movement’, which initially formed the project of an international convention in July 1949 in the Hague, the main goal was ‘the creation among the European democracies of a system of collective security against tyranny and oppression’ and that ‘without delay, joint measures should be taken to halt the spread of totalitarianism and maintain an area of freedom’. In *European Movement and the Council of Europe* (Hutchinson, 1949). The limited purpose of the ‘alarm bell’ system would therefore explain the quasi-judicial character of the Court, which lasted until the introduction of Protocol 11 in 1949. As to the Court more specifically, Bates explains that ‘it would be the conscience of the free Europe, acting like an ‘alarm bell’ warning the other nations of democratic Europe that one of their number was going ‘totalitarian’. At this stage, then, the human rights guarantee was minimalist in its ambition’. Ed Bates, ‘The Birth of the European Convention on Human Rights’, in Jonas Christoffersen and Mikael Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2011), 21.

² In his seminal article, Moravcsik argues that neither realism nor idealism explains the state’s acceptance of the Court’s compulsory jurisdiction and the right to individual petition, which ‘constrain its domestic sovereignty in such an unprecedentedly invasive and overtly non-majoritarian manner’. Rather, the explanation lies in the state’s tactic to consolidate democratic institutions vis-à-vis internal political opponents in times of uncertainty: ‘sovereignty costs are weighted against establishing human rights regimes, whereas greater political stability may be weighted in favour of it’. In Andrew Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,’ *International Organization* 54, no. 2 (2000): 220–221.

³ Bates, ‘The Birth of the European Convention on Human Rights,’ 39.

⁴ Most recently, Prime Minister David Cameron included in his agenda for EU reform the following objective: UK police forces and justice systems should be ‘able to protect British citizens, unencumbered by unnecessary interference from the European institutions, including the European Court of Human Rights’. Available at <http://www.theguardian.com/world/2014/mar/16/david-cameron-eu-reform> (accessed January 15, 2015). On the issue of the prisoners’ right to vote, Cameron held in 2009 that ‘it makes me physically ill to even contemplate having to give the right to anyone who is in prison (...)’. Available at <https://www.youtube.com/watch?v=DjzmvvozHuw> (accessed January 15, 2015).

human rights are universal in abstraction but national in application, it is not easy to see how in principle an international court was going to perform this function of deciding individual cases, still less why the Strasbourg court was thought a suitable body to do so'.⁵ In parallel to the political discourse, legal scholars have articulated sophisticated arguments that question the Court's supreme interpretive role either in function or in content. For example, some argue that the Court fails to regard the on-going 'democratic' discussion of the content and limits of those rights in domestic legal orders (generated by the subsidiary role of the Court) when the Court adopts a *teleological* approach to adjudication, that is, when it defines for itself the *telos* of the Convention. As Wheatley puts it, 'the political culture of the democratic States, i.e. the way in which political debate is conducted within democratic society, is not sympathetic to any claim to 'know better' by an actor or institution on issues of social, economic and political controversy, i.e. where there is disagreement (...)'.⁶ The range of self-created interpretive doctrines ('living instrument', 'evolutive and dynamic'; 'autonomous concepts' or even 'practical and effective'), which extend the Court's judicial powers far beyond what drafting states could possibly have envisioned, is thereby concerned.⁷

In this article, I argue that the role of the Court amounts to reinforcing the same democratic-procedural standards by which its critics assess the Court's performance. The basis of my counter-critique is empirical: while the current literature employs democracy as an independent normative standpoint to assess the Court's practice, it often fails to locate and reconstruct the place and the role of democracy *in* the reasoning of the Court. True, how democracy operates within this judicial context and what kind of reason it gives – to justify, to enlarge or to restrict the scope of the Convention rights – is not clear from the text of the Convention. Although it is included the Preamble, democracy is only found in the restriction clauses of the qualified rights of the Convention (Articles 8-11). More precisely, 'democratic society' stands prominently at the final stage of what has been called the 'fair balance test'⁸ when the Court finally balances the alleged interference with the Convention right(s) against the justification given by the respondent state party⁹ – verifying that the authorities 'struck a fair balance' between the right and some collective interest. Even a quick look at the case law

⁵ Lord Hoffmann, 'The universality of human rights', *Judicial Studies Board Annual Lecture*, 19 March 2009. Available at: <http://www.judiciary.gov.uk/2009-4/speech-lord-hoffman-19032009.html> (accessed October 15 2014).

⁶ Steven Wheatley, 'On the Legitimate Authority of International Human Rights Bodies,' in *The Legitimacy of International Human Rights Regimes*, ed. Andreas Follesdal, Johan Karlsson. Schaffer, and Geir Ulfstein (Cambridge: Cambridge University Press, 2013), 103.

⁷ The group of legal experts mandated by the Committee of Ministers of the Council of Europe (CoE) to examine the Convention's proposal (in 1949) claimed in their advisory opinion that 'the jurisprudence of a European Court will never, therefore, introduce any new element or one contrary to existing international law'. Cited in Bates, 'The Birth of the European Convention on Human Rights,' 39.

⁸ For a still-to-date overview, see A. Mowbray, 'A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights,' *Human Rights Law Review* 10, no. 2 (2010): 289–317.

⁹ This is also where the Court may allocate a margin of appreciation to the respondent state party. Yutaka Arai-Takahashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry,' in Andreas Follesdal, Birgit Peters, and Geir Ulfstein (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge: Cambridge University Press, 2013), 62. The margin of appreciation doctrine is not explicit in the Convention (or in the preparatory works). The doctrine is conceived as justifying the limits of the Court's interpretive authority on national courts. It is a jurisprudential creation that dates back to the need for acceptability of the Court's authority vis-à-vis the state parties. As Arai-Takahashi explains, 'since the inception, this consideration has impacted upon the judicial policy of the Strasbourg organs (the European Court of Human Rights (ECtHR, or the Court) and the erstwhile European Commission of Human Rights) in mitigating 'damaging confrontations' between them and the member states by allocating 'spheres of authority''. In *Ibid*, 63.

on those qualified rights shows that democracy and more particularly the notion of ‘democratic society’ plays a justificatory role in the Court’s resolution of cases.

Regrettably, however, the systematic and normative reconstruction of the Court’s ‘democratic society’ has been rather neglected in the recent literature on the legitimacy of the Court’s authority.¹⁰ This article remedies this deficit and shows that the Court relies on a normative conception of ‘democratic society’ to justify its judicial authority vis-à-vis the respondent state party. Two *caveats* must be mentioned from the onset, however. The first is that the argument centers on the qualified rights of the Convention where the normative role of ‘democratic society’ is most salient (Articles 8—11). This is an important limit to the argument. While the notion now extends to other rights of the Convention¹¹, it does not necessarily play the same normative role in the finding of the violation. The second is that I do not extract the Court’s conception of ‘democratic society’ from explicit and principled statements of the Court. Rather, I adopt an inductive method and identify the contours of this conception by successively examining how ‘democratic society’ governs the scope of Article 10 (expression), Article 11 (assembly and association) and Article 3 (Protocol 1) (free elections). The need for a right-based approach is also due to the *ad hoc* character of the Court’s review process (each case examined ‘on its merits’).

There are three specific steps in the argument. In section 2 of the article, I shed light on the crucial role that ‘pluralism’ plays in substantively defining the Court’s ‘democratic society’. There is of course the Preamble’s passage to which the Court systematically refers to justify the wide scope of Article 10 (expression) and Article 11 (reunion and association): ‘such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’’.¹² But what matters more is how the Court has extracted the normative role of pluralism from that founding passage to justify the extended scope of the ‘political’ rights of the ECHR; on freedom of expression, most prominently, the Court routinely relies on pluralism to impose a positive duty on state parties that extends ‘not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb’ find a place in the public arena’.¹³ The adversarial character of public debates is routinely required by Strasbourg’s ‘democratic society’ and culminates in the formal recognition of a ‘right of the public to be informed of various perspectives’ on an issue of public interest, as I shall explain.

The second step of my argument in section 3 of the article is to make normative sense of the Court’s proposition that pluralism fosters ‘democratic society’. I argue that the Court’s emphasis finds support in the so-called ‘egalitarian’ argument for democracy championed by

¹⁰ This is not to say that human rights theorists have not suggested how human rights and democracy connect in moral and abstract terms. Rather, what is missing is a specific assessment of the Court’s ‘democratic society’ on the basis of normative theory. See e.g. in particular Samantha Besson, ‘Human rights and democracy in a global context: decoupling and recoupling’, *Ethics & Global Politics* 4, no.1 (2011). See also Rainer Forst, ‘The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach’, *Ethics* 120, no. 4 (2010): 711–40.

¹¹ As De Schutter and Tulkens report, ‘the case law of the European Court of Human Rights has extended this approach to certain rights and freedoms whose formulation in the Convention does not follow this two-tiered structure, progressively developing what may be called a general theory of restrictions to the guarantees of the European Convention of Human Rights’. In Olivier De Schutter and Françoise Tulkens, ‘Rights in Conflicts: The European Court of Human Rights as a Pragmatic Institution’, in Eva Brems (ed.), *Conflicts Between Fundamental Rights* (Cambridge: Intersentia, 2008), 200.

¹² *Handyside v United Kingdom*, App no 5493/72 (ECHR, 7 December 1976), at para 50.

¹³ *Ibid.*

Thomas Christiano. The driving thought is that members of a political community have more reasons to accept the outcome of the democratic procedure if they were recognized as ‘public equals’ – that is, if they were allowed to express their views (however divisive) and to persuade others. The wide scope of freedom of expression serves this legitimacy function. Surely, adopting this account would require discussing other conceptions of democracy in political theory. My objective is here limited to show that the Court’s adjudication is responsive to a particular democratic *ethos*, not to demonstrate *if* and *how* that particular *ethos* can defeat its rivals in political theory.¹⁴ It must also be noted that Christiano takes his argument to justify judicial review.¹⁵ I then return to the reasoning of the Court to show how this interpretation can further illuminate the Court’s reasoning on other qualified rights. Not just expression but also peaceful assembly and association (Article 11) as well as the right to free elections (Article 3 (Protocol 1)) are all justified upon the search for public equality in conditions of deep pluralism. Once those rights and their duties are envisioned as a whole, it appears that the Court justifies its interpretive authority on distinctively democratic grounds (procedural and substantive), which offers a fundamental response to its critics. As a result, rather than interfering with the democratic process within state parties, the Court reinforces and consolidates it.

Finally, I discuss in section 5 possible objections to the argument. Democratic theorists have for long argued that domestic judicial review does not and cannot respect the representativeness that is required from democratic institutions.¹⁶ Interestingly, the argument was recently re-activated – under a modified form – in the context of the Court and international human rights bodies (hereafter, IHRBs) more generally. While accepting in principle the function of judicial review, Steven Wheatley objects that Strasbourg’s interpretive methodology does not incorporate the democratic specification of human rights norms that has been developing within the state parties.¹⁷ Alternatively, Richard Bellamy examines in a recent article the Court’s authority through the lens of his political constitutionalist framework and concludes that the Court’s legitimate role should be confined to a weak form of review.¹⁸ If the scope of those two arguments differs, both accounts fail to

¹⁴ See in particular the critique of the application of Christiano’s argument to judicial review by Corey Brettschneider, ‘Judicial Review and Democratic Authority: Absolute v. Balancing Conceptions’, *Journal of Ethics and Social Philosophy* 5, no.3 (2011), available at <http://www.jesp.org/symposia.php> (Accessed January 15, 2015).

¹⁵ As Christiano puts it in a reply to his critics, ‘I argue that under the right conditions a system of judicial review of legislation that empowers the judiciary to strike down legislation that violates public equality can be legitimate. This is because a decision of the democratic assembly that violates public equality has no value, so a court that strikes it down will at least have the value that it preserves public equality’. In Thomas Christiano, ‘Reply to Critics of the Constitution of Equality’, *Journal of Ethics and Social Philosophy* 5, no.3 (2011), available at <http://www.jesp.org/symposia.php> (Accessed January 15, 2015).

¹⁶ The domestic critique can take a radical form. In a seminal article, Jeremy Waldron contends that installing a (supranational) court with the final word over the content and scope of abstract rights ‘inherently and necessarily does an injustice, in its operation, to the participatory aspirations of the ordinary citizen’. See Jeremy Waldron, ‘A Right-Based Critique of Constitutional Rights’, *Oxford Journal of Legal Studies* 13, no. 1 (1993): 18–51. See also Jeremy Waldron, ‘The Core of the Case against Judicial Review’, *The Yale Law Journal* 115, no. 6 (2006): 1346–1406. In the words of Christopher Zurn, Waldron ‘seems to regard most forms of extra-legislative governmental power as regrettable reflections of an anti-egalitarian and anti-democratic bias against ordinary citizens’. See Christopher F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge: Cambridge University Press, 2007), 145.

¹⁷ Wheatley, ‘On the Legitimate Authority of International Human Rights Bodies.’

¹⁸ Richard Bellamy, ‘The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights’, *European Journal of International Law* 25, no. 4 (2014): 1019–42.

systematically examine the structure and content of the Court's reasoning and differentiate between rights and between the duties correlative to those rights. My legal-empirical inquiry reveals, as far as Articles 8-11 are concerned, that the Court justifies its interpretive authority by asserting the same basic normative criteria of democratic legitimacy – e.g. the need to address the interests of all subjects in the democratic procedure – that those authors employ to examine the Court's authority.

In this final section, I also contrast my argument with George Letsas' 'moral reading' argument according to which the very purpose of human rights adjudication is 'is to discover, over time and through persuasive moral argument, the moral truth about these fundamental rights'.¹⁹ My inquiry importantly nuances this view. That the Court engages with moral reasoning and dismisses positivist doctrines of adjudication (e.g. literalism, originalism, intentionalism, consensualism, etc.) strikes me as largely correct. That the Court is searching and discovering the moral *truths* of those rights – an argument reminiscent of *realism* in moral theory – is quite another thing. This part of argument requires showing that the Court's findings are not only moral-deontological in kind but that the Court reports in its judgments what it takes to be independent moral facts. However, the deontological nature of the Court's statements does not necessarily imply that those statements are viewed as moral truths (based on the sole text of the judgments). Judges could agree on the premise of public equality while diverging about the ultimate moral foundations of that status. My inquiry rather suggests that the Court's adjudication amounts to identifying the duties and duty-bearers that serve the realization of this basic equality in the conditions of deep pluralism.

2. Reconstructing the Court's 'democratic society'

The first premise to my argument is the governing role that the notion of 'democratic society' plays in the Court's *ad hoc* resolution of cases. It is therefore necessary to carefully locate, in descriptive terms, where the notion operates in the formal structure of the review. When the Court reviews whether a piece of domestic legislation conforms to the Convention, it can find an interference with one or more rights only on the basis of the facts of the case presented by the applicant and examined in light of a set of established interpretive principles. Yet the interference does not amount to a violation if the respondent state party can justify its interference via the restriction clauses, which are almost identical for all the qualified rights (Articles 8–11) of the Convention ('publicity', 'legitimate aim', 'democratic necessity'). The Court thereby switches the burden of proof to the state party. As Gerards and Senden explain, 'a definitive conclusion about the alleged violation can be reached only when the soundness of the justification adduced by the government has been scrutinized'.²⁰

It is widely agreed that the Court has spilled much more ink on this last step ('democratic necessity') than on the two others ('accessibility of the law'²¹ and 'legitimate aim'²²) and

¹⁹ George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer,' *The European Journal of International Law* 21, no. 3 (2010): 540.

²⁰ Janneke Gerards and Hanneke Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights,' *International Journal of Constitutional Law* 7, no. 4 (2009): 623.

²¹ At this stage, the Court reviews whether the legal norm was accessible to the individual. This mostly implies that the law must be published. The Court also reviews whether the legal norm is formulated with the precision as to its meaning and scope – the *foreseeability* of the law.

²² At this stage of the test, the Court reviews whether the interference pursued a 'legitimate aim' – as specified in the second paragraph of Articles 8-11: the protection of public safety, public order, health or morals, or for the protection of the rights and freedoms of others, etc.). This standard is ambiguous. Its wording suggests that it

sometimes even conflates the first two with the third. While ‘legitimate aim’ is treated by the Court as an exercise of classification without much discussion, it takes ‘necessary in a democratic society’ as forming the central step of the test. As Arai-Takahashi confirms, ‘the Strasbourg organ may prefer to focus their scrutiny on the third standard, finding it unnecessary to ascertain compliance with the first and second standard’.²³ It goes without saying that the formulation is ambiguous: not only is ‘democratic society’ undefined in the Convention, but it is also silent on which normative standards make the violation necessary (the standards of proportionality *stricto sensu*) in that society. In fact, rather than directly specifying what those standards are, the Court has engaged in defining what it takes to be the essential conditions of a ‘democratic society’ and then has articulated how each of the qualified rights (the interest(s) they protect, the duties and duty-bearers they entail) serves that society. Consequently, the interpretation of this notion is another occasion – in addition to the interpretation of the rights’ wording – to specify what those rights ultimately are about, and more importantly, how specifically each relates to democracy.

Most importantly, the Court binds ‘democratic society’ to a normative notion of pluralism. While pluralism certainly does not exhaust ‘democratic society’ in the Court’s eyes, it is often located at the end of the Court’s justificatory reasoning when it favors the right(s) over the respondent state party. This is particularly the case of the right to freedom of expression (Article 10). The Court long ago established the inherent link between expression and democracy. In the seminal *Handyside v. United Kingdom*, which pertained to the publication of the Little Red School Book (encouraging young people to reflect on societal norms including sex and drugs), the Court held that ‘freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man (...)’.²⁴ Yet the Court has not subsequently specified how expressing a view in public furthers self-development. Rather, it has emphasized how the expression of pluralistic views benefits a democratic society as a whole. Since the same *Handyside v. United Kingdom*, the Court routinely relies on the Preamble’s widely cited passage that ‘such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’’²⁵ to support this emphasis.

It must be clear that the Court’s emphasis on pluralism goes well beyond a mere factual recognition of diversity and disagreement in public debate: the Court firmly holds that pluralism serves ‘democratic society’. This is seen in how pluralism generates a salient positive duty requiring states to guarantee access ‘not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb’ find a place in the public arena’.²⁶ This sentence has become the Court’s *lingua franca* on freedom of expression when it justifies the place of extremist political views, insults to heads of states, satire or just exaggeration in public debate. The thought is that the Court does not just allow individuals to make their claim in the public arena, however ‘unpalatable’ they are. It also suggests that pluralism and contradiction are necessary to a ‘democratic society’ and thereby should govern the scope of freedom of expression. Let us take the case of extremist political views. In *Gündüz v. Turkey*, which

incorporates a justificatory dimension. However, the Court treats it as an exercise of classification and tends to turn to evaluation only at (or just conflates the stage with the last stage) the stage of ‘democratic necessity’.

²³ Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Cambridge: Intersentia, 2002), 9.

²⁴ *Handyside v United Kingdom*, at para 49.

²⁵ *Ibid.*

²⁶ *Ibid.*

concerned the leader of an Islamic sect defending sharia law on an independent Turkish television channel, the Court famously held that while Sharia law is incompatible with a democratic society (it ‘clearly diverged from Convention values’²⁷), publicly defending its implementation cannot be subject to restriction under the ‘democratic necessity’ clause. The standard against which the case is measured, which in turn determines the margin of appreciation, is precisely whether the views expressed by the claimant were counterbalanced in the public arena:

‘the applicant’s extremist views were already known and had been discussed in the public arena and, in particular, were counterbalanced by the intervention of the other participants in the programme; and lastly, they were expressed in the course of a pluralistic debate in which the applicant was actively taking part. Accordingly, the Court considers that in the instant case the need for the restriction in issue has not been established convincingly’.²⁸

As in the case of separatist views²⁹, the Court suggests that the most divisive views ought to be equally entitled to be expressed within an on-going public debate and counter-balanced with contradictory views. The same is true, for instance, in *Lehideux and Isorni v. France*, which pertained to the publication of a press article depicting the career of Marshal Pétain in a positive fashion and that the French courts condemned. However, the Court found a violation of Article 10 arguing that ‘that forms part of the efforts that every country must make to debate its own history openly and dispassionately’.³⁰ Several questions emerge from this reading of the Court’s reasoning: is pluralism compelling because it allows individuals to find some form of *consensus* on issues on which they initially disagreed? Or is pluralism desirable because it allows publicly held views to go through the Millian process of ‘trial and error’ in the search for improved beliefs? I address those issues in the next section of the article.

More importantly at this point: does the Court’s attachment to pluralism apply to all views held in public? The Court faces this question, for instance, when it balances freedom of expression against the right to reputation under Article 8 (privacy). In the recent *Von Hannover v. Germany*, which concerned the publication the pictures of the private life of Princess Caroline of Monaco, the Court made explicit that pluralism is particularly important when a *public* interest is at stake. If that interest is not found, state parties enjoy a margin of appreciation. The Court circumscribes the domain of ‘public interest’ very clearly:

‘The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of ‘watchdog’ in a democracy by contributing to

²⁷ *Gündüz v Turkey*, App. No. 35071/97 (ECHR, 4 December 2003), at para 51.

²⁸ *Ibid.*

²⁹ In *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, the Court held that ‘demanding territorial changes in speeches and demonstrations does not automatically amount to a threat to the country’s territorial integrity and national security (...)’. In *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* Apps. no 29221/95, 29225/95 (ECtHR, 2 October 2001), at para 97.

³⁰ *Lehideux and Isorni v France*, App. No. 24662/94 (ECtHR, 23 September 1998), at para 51.

‘impart[ing] information and ideas on matters of public interest (...), it does not do so in the latter case’.³¹

The suggestion here is that the margin of appreciation correlates to the degree to which some publicly held view contributes to an on-going, plural and adversarial debate of public interest. When it applies the ‘democratic necessity’ clause, the Court systematically conducts such an assessment. In the recent case of *Otegi Mondragon v. Spain*, in which the applicant heavily criticized the institution of the Spanish monarchy, the Court confirmed that ‘there is little scope under Article 10 § 2 for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance – or in matters of public interest’.³² Most recently, in *Pentikäinen v. Finland*, which pertained to the arrest of a photographer in demonstrations surrounding an Asia-Europe meeting in Helsinki, the Court judged the facts against the same standard: ‘the Court considers that the demonstration was a matter of legitimate public interest, having regard in particular to its nature. From the point of view of the general public’s right to receive information about matters of public interest, and thus from the standpoint of the press, there were justified grounds for reporting the event to the public’.³³

The Court’s emphasis on pluralism culminates in the formal recognition that the larger public has a ‘right to be informed’ on issues of public interest. The right to be informed is clearly not confined to just hearing about a recent public issue. Here again, the Court suggests that ‘democratic society’ requires people to receive plural and contradictory perspectives on those issues. This right was initially claimed in *Erdoğdu and İnce v. Turkey*, which pertained to the interview of a sociologist on the conflict in Kurdistan; the Court held that ‘domestic authorities in the instant case failed to have sufficient regard to the public’s right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them’.³⁴ A recent instance of this reasoning is found in *Çamyar and Berktaş v. Turkey*, where the Court examined the content of a book that severely criticizes the Turkish penitentiary system.³⁵ Now, despite those notable efforts in conceptual exploration, the Court has not precisely explained why pluralism matters in a democracy. While holding normative statements about the proper nature of a ‘democratic society’, the Court has not established what exactly justifies the broad range of duties derived from such notion or why those duties outweigh other rights and duties protected by the Convention in case of conflict. This is where, I believe, one needs to engage with normative democratic theory.

3. Pluralism in the egalitarian argument for democracy

Having delineated the contours of the Court’s ‘democratic society’ and the prominent role of pluralism in substantively defining that society, the second step of my argument is to make normative sense of this predominant reasoning through normative democratic theory and more specifically the egalitarian argument for democracy. The limited scope of the paper does not allow me to retrieve all the steps of this argument, of course. I rather want to focus on the crucial role that pluralism plays in it, and how it can illuminate the Court’s specification of its

³¹ *Von Hannover v Germany*, App. No 59320/00 (ECtHR, 24 June 2004), at para 63.

³² *Otegi Mondragon v Spain*, App no 2034/07 8 (ECtHR, 15 March 2011), at para 50.

³³ *Pentikäinen v Finland*, App no 11882/10 (ECtHR, 4 February 2014), at para 51.

³⁴ *Erdoğdu and İnce v Turkey*, App No 25067/94 (ECtHR, 8 July 1999), at para 51.

³⁵ *Çamyar and Berktaş v Turkey*, App no 41959/02 (ECtHR, 15 February 2011), at paras 37-38.

‘democratic society’ delineated above. Indeed, egalitarian democrats not only assume that there are deep conflicts exist about how to define the terms of association in a political community. They also argue that democracy can best advance the equality of subjects in the making of those terms. As Christiano puts it, ‘democratic decision-making is the unique way to publicly embody equality in collective decision-making under the circumstances of pervasive conscientious disagreement in which we find ourselves’.³⁶

In his path-breaking book, Thomas Christiano firmly insists on the facts of *diversity*, *disagreement*, *cognitive bias* and *fallibility* as pervading collective deliberations on issues of public interest. Those facts constitute a serious challenge to the realization of political equality. The effect of cognitive bias, for instance, is that a person’s ‘ideas about the good life and even justice tend to reflect her own background, distinctive experiences, and talents’.³⁷ The risk is that this person’s judgment about the common good unilaterally applied to all is likely to fail to take into account the interests of others. Further, egalitarian democrats assume that such conflicts cannot be solved by rational persuasion on terms that will be acceptable to all, which marks the distinction with a range of views in deliberative democracy attached to reaching an overlapping consensus or a compromise. For Christiano, in contrast, the cost of attempting to find consensus or a compromise may be too high and could be unequally distributed among deliberators.³⁸

Of course, the egalitarian justification of democracy cannot just rely on factual considerations pertaining to pluralism and disagreement in collective deliberation. Any account of democracy relies on a deontological premise about the fundamental equality of individuals. Christiano, for instance, relies on a concept of persons as ‘authorities in the domain of values’ to express that concern.³⁹ However, *which rights* should be exercised to foster this basic equality in practice, and *to what extent*, is highly contentious. In contrast to other accounts, the egalitarian argument attempts to answer those vexing questions – including by suggesting how to resolve conflicts of rights – in a way that maximizes the equal advancement individual interests. As Christiano explains, ‘the principle invites us to think about how all the rights, duties, roles, and special relationships fit together in in an overall institutional scheme so that people’s interests are advanced in such a way that they are advanced equally’.⁴⁰ The limits adduced to the rights should be viewed through the tension between pluralism *qua* fact and the principle of public equality *qua* norm.

This is precisely where the right to freedom of expression gains prominence. Allowing individuals to widely express their (divisive) views not only ensures that their interests are equally taken into consideration *publicly*. On the one hand, it serves the interest of speakers in that ‘the protection of the right to freedom expression also advances the interests of each person in being recognized and affirmed as an equal in society’.⁴¹ On the other hand, given

³⁶ Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (New York: Oxford University Press, 2010), 75–76.

³⁷ *Ibid.*, 154.

³⁸ As Cohen explains, ‘the deliberative conception requires more than the interests of others be given equal consideration; it demands, too, that we find politically acceptable reasons – reasons that are acceptable to others, given a background of differences of conscientious conviction’. In ‘Procedure and Substance in Deliberative Democracy’ in Thomas Christiano (ed.), *Philosophy and Democracy: An Anthology* (Oxford University Press, 2003), 24.

³⁹ See Christiano, *The Constitution of Equality*, chapter 2.

⁴⁰ *Ibid.*, 31.

⁴¹ *Ibid.*, 152.

their cognitive bias, it serves the interest of listeners in that ‘a person can learn just about just as much by having his ideas expressed by others and responded to as he can by expressing his ideas himself’.⁴² If one advances a view regardless of what others think, then she does not treat others as equals in the context of deep pluralism. On those two counts, therefore, a wide scope helps (‘instrumentally just’⁴³ in Christiano’s terms). This account also impacts on the legitimacy of the outcome of the democratic procedure. If one ends up vastly disagreeing with the outcome, the fact that one was allowed to make her claims in public and persuade others gives one content-independent reasons to accept the outcome: ‘the thought is that when an outcome is democratically chosen and some people disagree with the outcome, as some inevitably will, they still have a duty to go along with the decision because otherwise they would be treating the others unfairly’.⁴⁴

Finally, the principle of public equality can help resolving conflicts of rights. For Christiano, the two interests to a conflict should be viewed through their contribution to public equality. In the classical case of blasphemy for instance, the blasphemer’s right to express his view publicly and convince others prevails against the harm caused by the act of blasphemy: ‘to ban blasphemy would amount to setting back the interests of the alleged blasphemer so that another’s interests in having his desire that everyone conform their behavior and speech to his opinions be respected’.⁴⁵ Not only should the blasphemer be allowed to express his view. The opponent to blasphemy can also try to persuade the blasphemer to stop so that both interests are equally and publicly advanced. In the next section of the article, I show how this rationale can apply to the Court’s resolution of the conflict between the freedom of expression (Article 10) and the right to reputation (under Article 8).

This overview of the egalitarian defense of democracy should not obscure other conditions that Christiano takes to be central to realize public equality such as an economic minimum.⁴⁶ Clearly, the egalitarian argument for democracy could also provide a normative standpoint to assess the limits of the Court’s ‘democratic society’. My point here is limited to showing that the Court’s understanding of freedom of expression is faithful to the cardinal value of public equality when it protects views that ‘offend, shock or disturb’ or when it holds that a ‘democratic society’ requires people to receive plural and contradictory perspectives on an issue of public interest – thereby showing that the Court’s reasoning in fact relies upon democratic-procedural considerations.

4. The rights, duties and duty-bearers required by the Court’s ‘democratic society’

Up to this point, my objective was to show that the Court’s ‘democratic society’ and ultimately the positive duty derived from pluralism finds support in democratic theory and, within the field, in the egalitarian argument for democracy. I concentrated on the right to freedom of expression (Article 10) and on the main definitional statements of the Court when it has to substantiate its normative notion of ‘democratic society’. In this section, I want to

⁴² Ibid., 131.

⁴³ Ibid., 264.

⁴⁴ Thomas Christiano, ‘Authority,’ in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Spring 2013, 2013, <http://plato.stanford.edu/archives/spr2013/entries/authority>.(accessed January 15, 2015).

⁴⁵ Christiano, *The Constitution of Equality*, 164.

⁴⁶ As Christiano explains, ‘the first claim must be assessed against the background that the democratic and liberal rights are assured and that each has a basic minimum of material goods. If these latter conditions are satisfied, then it appears that the society is treating its members publicly as equals’. Ibid., 178.

show how this approach can not only illuminate the Court's identification of particular duties and duty-bearers correlative to that right but also show how it extends to peaceful assembly and association (Article 11) and to the right to free, fair and regular elections (Article 3 Protocol 1). As explained above, all individuals must be equally informed on the issues that affect them all and equally informed on what others think on those issues. If one simply thinks that one can easily access the other's thoughts on those issues, then one treats others unfairly in the context of deep pluralism. Let us start with more specific right-bearers under Article 10 (expression). Most importantly, the Court cannot insist enough on the role of the press as 'public watchdog' of its 'democratic society'. Since this argument first appeared in *Jersild v. Denmark*, which concerned a TV interview of members of racist group in a Danish newspaper, the Court has been reinforcing the point:

'It is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'. Although formulated primarily with regard to the print media, these principles doubtless apply also to the audio-visual media'.⁴⁷

The allocation of the margin of appreciation is the legal-structural implication of the Court's attachment to democracy. If freedom of the press is the vehicle of an informed debate on issues of public interest, then the margin of appreciation left to states parties should be thin even when the finding of a violation involves significant costs on the other party (such as in the conflict with the right to reputation under Article 8). This is precisely the argument defended by the Court. As the Court makes clear in *Editions Plon v. France*, which concerned the publication of a book on the health of French president François Mitterrand, 'the national margin of appreciation is circumscribed by the interests of a democratic society in enabling the press to exercise its vital role of 'public watchdog''.⁴⁸ Note here that by 'political' or 'public' issue, the Court can mean post-electoral comments such as in *Lingens v. Austria*⁴⁹, the status of past political figures in *Lehideux and Isorni v. France*, the issue of doping in sport as in the recent *Ressiot et autres c. France*⁵⁰ or the quality of public water in the recent *Šabanović v Montenegro and Serbia*.⁵¹ The core rationale is the same: if the press cannot inform the people about the nature of the public interest and offer plural views on it, one can neither limit one's own bias on the ideas and actions that should constitute the public good, nor receive the guarantee that one is publicly treated an equal. The same line of reasoning extends to the actions of governments and political parties that the press may report (as well as NGOs, scientists, intellectuals, etc.).

Here again, is there any limit to the press' freedom? One limit is that, despite the need for exaggeration and provocation needed to realize a 'democratic society', there should be a significant *distortion of facts*. This is the case of *Kania and Kittel v. Poland*, in which two

⁴⁷ *Jersild v Denmark*, App. No. 15890/89 (ECHR, 23 September 1994), para 31. See also *Thorgeir Thorgeirson v. Iceland*, App. No. 13778/88 (ECtHR, 25 June 1992), para. 63 and *Bladet Tromsø and Stensaas v. Norway* (ECtHR, App. No. 21980/93), 20 May 1999, para. 62.

⁴⁸ *Editions Plon v France*, App. No. 58148/00, 18 May 2004 (ECHR, 18 May 2004), at para 43.

⁴⁹ *Lingens v Austria*, App. No 9815/82, 8 July 1986 (ECHR, 8 July 1986), at para 42.

⁵⁰ *Ressiot et autres c. France*, App no. 15054/07, 15066/07 (ECHR, 28 July 2012), at para 114.

⁵¹ *Šabanović v Montenegro and Serbia*, App no 5995/06 (ECtHR, 31 May 2011).

Polish journalists published pictures of a car that a Polish minister supposedly received as a gift from a businessman:

‘It is true that, when taking part in a public debate on a matter of general concern – like the applicants in the present case – an individual is allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements (...). However, the Court considers that there is a difference between acceptable exaggeration or provocation, or somewhat immoderate statements, and the distortion of facts known to the journalists at the time of publication’.⁵²

The Court adopted the same argument in *Lindon, Otchakovsky-Laurens and July v. France*, which involved a series of criminal convictions related to the publication of a book on French politician and then-head of Front National party Jean-Marie Le Pen, implicating Le Pen’s responsibility in the party’s violent action. In this case, the Court held that the terms of ‘executioner’ and ‘chief of a gang of killers’ exceeded the limits of the right to freedom of expression on empirical grounds.⁵³ This is one of the only cases in which reputation outweighs expression. When the expression is about opinions and judgments (non-factual), the Court falls back on its democratic ethos. The expression of criticism, insult, exaggeration or satire is most justifiable when it concerns elected politicians and members of the government. This is best seen in the way the Court understands the conflict between Article 10 and the right to reputation of politicians subject to criticism (under the right to private life in Article 8). In *Oberschlik v. Austria* (no 2), the applicant was convicted and ordered to pay a fine for having used the term ‘idiot’ in reaction to a speech of Austrian politician Jörg Haider. The Court held the following:

‘as to the limits of acceptable criticism, they are wider with regard to a politician acting in his public capacity than in relation to a private individual. A politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism. He is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, but the requirements of that protection have to be weighed against the interests of open discussion of political issues, since exceptions to freedom of expression must be interpreted narrowly’.⁵⁴

The same is true when private citizens publicly insult heads of states as in the recent *Eon v. France*.⁵⁵ How does the egalitarian defense of democracy solve this conflict? Again, it suggests considering the costs of limiting each right in light of the quest for public equality. The head of state holds a crucial public role and stands at the core of how a society is organized. This position implies that what people think about that particular person should be constantly and equally debated, so that public equality can be equally advanced: ‘these public figures have a great influence on the public and represent certain ways of living or approaches to the organization of society or even styles of thinking. Thus they ought to that extent be

⁵² *Kania and Kittel v Poland*, App no 35105/04 (ECHR, 21 June 2010), at para 47.

⁵³ *Lindon, Otchakovsky-Laurens and July v France*, App. Nos. 21279/02, 36448/02 (ECHR, 22 October 2007).

⁵⁴ *Oberschlik v Austria* (No.2), App. No. 20834/92 (ECtHR, 1 July 1997), para 29.

⁵⁵ *Eon c. France*, App no 26118/10 8 (ECtHR, 14 March 2013), at para 60.

more open to attacks and the standard of libel that protects them ought to be more stringent, so that open and free discussion about the issues they raise can be advanced'.⁵⁶

Under Article 11 (reunion and association), one can take the Court's understanding of the role of political parties and the conditions of their dissolution as another example. Since pluralism is at least as pervasive among individuals as among political parties, the sufficient condition for dissolving a party should be stringent. In *United Communist Party of Turkey and Others v. Turkey*, in which the Turkish communist party was dissolved by Turkey's constitutional court, the Court held that 'there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned'.⁵⁷ Even when it considered the public defense of Sharia law, the Court maintained its line of reasoning. For the egalitarian democrat, banning anti-egalitarian views is a violation of the principle of public equality even if the anti-egalitarian does not adopt it: 'there is no difficulty in treating people who are opposed to equality in accordance with the principle of public equality. And there is no difficulty in seeing that the banning of the expression of beliefs opposed to equality is a public violation of equality'.⁵⁸

Now, if the political party in question has a real chance to seize power and endanger the democratic process itself once in office (notably by not respecting pluralism⁵⁹), the Court holds that it should be dissolved. This is where the democratic procedure is limited by the substantive values that justify the procedure in the first place. More broadly, any political party or group may promote an alternative 'societal model'⁶⁰ through constitutional changes conducted through democratic rules. The right to free elections (Article 3 (Protocol 1)) is here certainly implied. However, for a ruling party to implement elections and yet constrain pluralism would clearly fail to respect the standards of a 'democratic society'. On that other count, the Court's requirement of respecting the democratic procedure also implies substantive limits on the outcome of that procedure. But the normative basis is essentially the same: the respect for public equality in the context of deep pluralism. The interest in promoting public equality is an interest in exercising some rights to some extent. If the outcome of that procedure amounts to limiting that distribution, or to discriminate among groups or persons in the exercise of those rights, then this outcome is anti-democratic. For the egalitarian democrat, 'the principle of public equality serves as a constraint on the advancement of the interests of the members of society'.⁶¹ The rights therefore operate as trumps against the utilitarian quest for the aggregated majoritarian good when such a quest harms the deontological principle of public equality.

Finally, under the right to free and fair elections (Article 3 (Protocol 1)), the Court has made explicit that elections are inconceivable if the state party has failed to fulfill the positive duty associated with pluralism. On the egalitarian view, this is simply because voting on an issue of public interest without being informed of others' views on an issue public interest is

⁵⁶ Christiano, *The Constitution of Equality*, 166.

⁵⁷ *United Communist Party of Turkey and Others v Turkey*, App. No. 29400/05 (ECtHR, 30 January 1998), at para. 57.

⁵⁸ Christiano, *The Constitution of Equality*, 166.

⁵⁹ See *Refah Partisi (The Welfare Party) and Others v Turkey*, App. Nos. 41340/98, 41342/98, 41343/98, 41344/98 (ECtHR, 13 February 2003), at para 87.

⁶⁰ *Ibid.*

⁶¹ Christiano, *The Constitution of Equality*, 168.

suboptimal in terms of realizing public equality. The point has been recently reiterated in *Şükran Aydın and Others v. Turkey*, concerning a mayor having campaigned for parliamentary elections in Kurdish, where the Court held ‘that free elections are inconceivable without the free circulation of political opinions and information’.⁶² Of course, if it forms part of a conceptual continuum with Articles 10 and 11, the right to elections does not play the same practical role. Freedom of expression is prevalent in pre-electoral periods; in *Bowman v. United Kingdom*, for instance, the Court held that:

‘for example, as the Court has observed in the past, freedom of expression is one of the ‘conditions’ necessary to ‘ensure the free expression of the opinion of the people in the choice of the legislature. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely’.⁶³

As to the more specific duties correlative to the right to free elections, the Court is remarkably modest. It does not examine the constitutional arrangements of the state party in great detail. This modesty is clearly questionable under the egalitarian conception of democracy. The core duty established by the Court is that elections ‘must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage’.⁶⁴ This implies, most importantly, the absence of pressure on the voters. As the Court held in the same *Yumak and Sadak v. Turkey*, which pertained to the organization of parliamentary elections in Turkey, ‘the words ‘free expression of the opinion of the people’ mean that elections cannot be conducted under any form of pressure in the choice of one or more candidates, and that in this choice the elector must not be unduly induced to vote for one party or another’.⁶⁵ In the same modest vein, the Court protects the effective representation of elected members (most notably, in the national parliament) and their duty to apply the commitments they made during the pre-election period. As the Court held in *Ahmed and Others v. United Kingdom*, which concerned the limits put to the involvement of local government officials in political activities, ‘members of the public also have a right to expect that the members whom they voted into office will discharge their mandate in accordance with the commitments they made during an electoral campaign and that the pursuit of that mandate will not flounder on the political opposition of their members’ own advisers’.⁶⁶

However, the Court does not require states parties to conform to a specific system of elections and representation and the type of ballot designed (proportional, majority, etc.) as long as the core duties outlined above are protected. As the Court held in the seminal *Mathieu Mohin v. Belgium*, which concerned various discriminations between Dutch-speaking and French-speaking parliamentary members,

‘article 3 (P1-3) provides only for ‘free’ elections ‘at reasonable intervals’, ‘by secret ballot’ and ‘under conditions which will ensure the free expression of the opinion of the people’. Subject to that, it does not create any ‘obligation to introduce a specific system’ (...) such as proportional representation or majority

⁶² *Şükran Aydın and Others v Turkey*, at para 55.

⁶³ *Bowman v United Kingdom*, App. No. 24839/94, 19 February 1998 (ECtHR, 19 February 1998), at para 42.

⁶⁴ *Lykourazos v Greece*, App. No. 33554/03, 15 June 2006 (ECtHR, 15 June 2006), at para 52.

⁶⁵ *Yumak and Sadak v. Turkey*, App. No. 10226/03 (ECtHR, 6 July 2008), at para 108.

⁶⁶ *Ahmed and Others v. United Kingdom*, App. No. 22954/93, 2 September 1998, at para 53.

voting with one or two ballots. Here too the Court recognises that the Contracting States have a wide margin of appreciation, given that their legislation on the matter varies from place to place and from time to time'.⁶⁷

A specific example of the Court's restraint is that it does not protect the *equality of opportunity* for election:

'it does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate 'wasted votes'. For the purposes of Article 3 of Protocol No. 1 (P1-3), any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the 'free expression of the opinion of the people in the choice of the legislature''.⁶⁸

This judicial restraint is clearly questionable if one adheres to the egalitarian democrat's argument. Regulating the conditions for parties to run for election (e.g. campaign finance) is another crucial opportunity to preserve and promote public equality. This issue is crucial because among the conditions to run for election, political parties representing minorities may have significantly lower levels of financial resources and therefore lower capacities to make the views of minorities heard and debated – therefore influencing not only the outcome of elections, but also designing the agenda for discussion. As Christiano explains: 'the views of the disadvantaged are likely to receive much less of a hearing in the democratic forum. As a consequence, there will be little opportunity to learn from the responses to these views'.⁶⁹ The search for public equality remains the guiding value – both procedural and substantive.

In this sense, the intermediate conclusion that needs to be drawn is that the Court is very attentive to considerations of democracy understood in procedural and substantive terms. What is more, I have shown that Court's 'democratic society' plays a central normative role in justifying the very existence of the Convention rights, in fixing their scope or in balancing their weight against other rights. Further, I have argued that the egalitarian justification of democracy can best make normative sense of their scope and the various duties the Court has generated on its behalf, making public equality the implicit normative ideal of the Court (under the rights examined). Based on this investigation, there is enough to say that there is a *conception* of democracy underlying the Court's reasoning.

Before addressing rival accounts and possible objections to this argument, I want first to draw some implications for how the balancing conducted by the Court, more specifically, has been conventionally portrayed and criticized in the literature. This is another point on which the current literature seems rather limited. Indeed, the literature tends to reconstruct the balancing as a largely arbitrary determination between deontology (the rights derived from the status of right-holders) against utilitarianism (the public interest understood as the aggregated preferences of others, or the aggregated preferences of all the state parties). Since this conflict is ultimately between two mutually exclusive concepts of morality, one cannot find a standard

⁶⁷ *Mathieu-Mohin and Clerfayt v. France*, App. No. 9267/81, 2 March 1987, at para 54.

⁶⁸ *Ibid.*

⁶⁹ Christiano, *The Constitution of Equality*, 199.

that would neatly strike the balance between them. Moreover, the Court remains silent on what exactly constitutes the public interest sufficient to override a right.⁷⁰

The combined effect is a strong skepticism towards the very idea of balancing. As Greer explains, ‘the central problem with the ‘balance model’ is that it suggests a weighing of rights and collective rights which does not only down-grades to interests, but requires judges – who are ill-equipped to decide what is in the public interest – constantly to defer to non-judicial determinations of how the balance between the two should be struck’.⁷¹ One proposal defended by Greer is that the Court should insist on applying a ‘priority-to-rights principle’ inherent to the Convention itself.⁷² This principle, in short, ‘systematically accords rights greater weight than collective goods’⁷³ without however implying that rights should systematically trump public interests. Rather, ‘the Convention merely suggests that rights should be ‘prioritized’ or ‘privileged’ over collective goods in different ways according to the terms of the Convention’⁷⁴ and ‘without the need for judges to refer directly to political morality at all’.⁷⁵ This view clearly amounts to a principled renouncement of balancing.

There is a point in favor of that strong skepticism towards balancing: the Court describes this step of the review in terms that invite it. In every case brought before it, the Court holds that it ‘must look at the interference in the light of the case as a whole’, including ‘the content of the impugned statements’ and the ‘context in which they were made’. This apparent vagueness has lead scholars to argue that ‘the balancing between the various conflicting interests takes place *ad hoc*, in the absence of a normative theory. This has naturally appeared arbitrary, particularly in view of the general requirement that courts must justify their decisions’.⁷⁶ This skepticism could go hand in hand with the democratic objection.

Yet in light of my investigation on the ‘democratic society’ clause, and the justificatory role it plays for the rights examined, portraying the Court’s balancing in those skeptical terms seems just too quick. Greer’s ‘priority-to-rights’ principle presupposes that the wording of the rights should orient the balancing, whereas my interpretation of the reasoning suggests that it is the ‘democratic society’ clause that not only helps the Court strike the balance but also define what those rights are about in the first place. Consequently, the reason why the public defense of Sharia law is permitted, for instance, should not have to do with some *a priori* stringency accorded to the freedom of expression. On my view, it is the deontological basis implicit in ‘democratic society’ (the search for public equality) that explains that explains why the right-holder prevails over the respondent state party.

⁷⁰ In a seminal case, *Young, James and Webster v United Kingdom*, The Court implicitly rejected the theorizing of the public interest: ‘democracy does not simply mean that the views of the majority must always prevail. A balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position’. In *Young, James, and Webster v. United Kingdom*, App. Nos. 7601/76, 7806/77 (ECtHR, 18 October 1982), at para 63.

⁷¹ Steven Greer, ‘Constitutionalizing Adjudication under the European Convention on Human Rights,’ *Oxford Journal of Legal Studies* 23, no. 3 (2003): 412.

⁷² For instance, the strong version of the principle is the derogation clause of Article 15 ECHR, which establishes that ‘no more than absolutely necessity’ considerations justify interfering with those rights.

⁷³ Greer, ‘Constitutionalizing Adjudication under the European Convention on Human Rights,’ 414.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, 413.

⁷⁶ George Letsas, ‘Two Concepts of the Margin of Appreciation,’ *Oxford Journal of Legal Studies* 26, no. 4 (2006): 711.

Surely, I am not extending this point to all the claims the Court has held on all the qualified rights of the Convention. It has been clearly shown that when the Court screens the pan-European practice to determine the appropriate level of protection of the rights under examination and fails to identify it, the respondent state party tends to override the applicant (through the margin of appreciation). More generally, ‘where the Court is unable to find the existence of a European consensus then it will tend to adopt a more literal interpretation of the Convention’.⁷⁷ For instance, under Article 9 (freedom of thought and religion), the Court has not specified what it takes to be a sufficiently strong manifestation of a religious belief in question to be protected and invokes the lack of a pan-European standard.⁷⁸ Yet the Court does not adopt this majoritarian approach when it finds a violation, which clearly introduces inconsistency in the methodology. There is also room for questioning how that judicial restraint fits into the ‘democratic society’ I have extracted.

5. Addressing potential objections and rival views

I hope to have now shown the extent to which the Court relies on a normative conception of ‘democratic society’ to justify its interpretive authority vis-à-vis its subjects. This conception helps the Court justify the rights’ foundations, identify their correlative duties and duty-bearers and balance rights against other rights or normative considerations. In this section, I draw the implications of my investigation for the on-going burning debate on the democratic legitimacy of the Court’s authority. Indeed, the argument that its supreme interpretive role cannot be reconciled with basic democratic-procedural standards is currently booming among legal and political theorists. Of course, democratic theorists have for long argued that domestic judicial review does not and cannot respect the representativeness that is required from democratic institutions domestically. Interestingly, the argument is today re-activated in the supranational context of UN Treaty Bodies and/or the Court. I concentrate here on two recent accounts, those of Steven Wheatley and Richard Bellamy. I present their core argument and then assess them in light of my investigation. Finally, I also explain how my view differs from Lestas’ ‘moral reading’ argument.

Wheatley’s ‘self-government’ conception

While accepting in principle the function of judicial review (to ‘develop the best interpretation of constitutional norms, including human rights norms, that can be justified in terms of the public concept of justice and public reason’⁷⁹), Wheatley objects that the predominant methodology of IHRBs does not incorporate the ‘democratic’ discussion of human rights norms that has been developing within the states’ legal and political orders. Although Wheatley’s argument does not concentrate on the Strasbourg Court specifically, his argument fully applies to the European context, which is illustrated by the reference to seminal cases of the Court. The core objection is that unlike those of national courts, the judgments of the Strasbourg’s Court and the interpretive tools that support them do not have a deliberative forum to enhance their public justifiability.

⁷⁷ Alastair Mowbray, ‘Between the Will of the Contracting Parties and the Needs of Today,’ in *Shaping Rights in the ECHR in Determining the Scope of Human Rights*, ed. Eva Brems and Janneke Gerards (Cambridge: Cambridge University Press, 2013), 36.

⁷⁸ This is the case for instance of scientology: ‘in the absence of any European consensus on the religious nature of Scientology teachings, and being sensitive to the subsidiary nature of its role, the Court considers that it must rely on the position of the domestic authorities in the matter and determine the applicability of Article 9 of the Convention accordingly’. In *Kimlya and Others v Russia* App no 76836/01, 32782/03 (ECtHR, 1 October 2009), at para 79.

⁷⁹ Wheatley, ‘On the Legitimate Authority of International Human Rights Bodies,’ 106.

Two core premises lead to Wheatley's critical conclusion about the Court's current practice. First, Wheatley rightly explains that state parties, in accordance with the principle of 'jurisdictional subsidiarity'⁸⁰, may develop their own understanding of the content and scope of human rights through their internal democratic procedure, including in courts. State parties indeed remain the primary interpreters and the only enforcers of the Convention. However, the Court's judicial methodology (the predominant doctrines of interpretation) tends not to take into account the outcome of that procedure: 'the dynamic or teleological approach to interpretation has led IHRBs to construe human rights norms in a way that is not consistent with the sovereign political wills of State parties reflected in the adoption of the international law instrument and their accession to the regime'.⁸¹

Second, Wheatley assumes that democracy – more specifically, a 'self-government' conception of democracy – is a response to the facts of pluralism and disagreement imposing requirements on the conduct of political deliberation:

'the importance of a self-government conception of democracy is confirmed by the facts of reasonable disagreement and imperfect knowledge in political discussions; the importance of private autonomy and public participation for the individual citizen; the requirement for (at least hypothetical) consent for the exercise of political authority; and the need for members of a political community to commit themselves to a process of collective decision-making that takes into account the interests of others within the community'.⁸²

As we have seen, Christiano's egalitarian argument relies on the same premises. However, Wheatley's response to the fact of reasonable disagreement and cognitive bias differs. He adopts a Rawlsian and Habermasian position in that democracy should still strive, through deliberation, to attain the assent of the all affected subjects, whether the norms in question originate at the national or international level (as with human rights treaties). Adopting this criterion has implications for the legitimate function of judicial review, whether national or international: 'the function of judicial review is to develop the best interpretation of constitutional norms, including human rights norms, that can be justified in terms of the public concept of justice and public reason, based on the relevant body of constitutional materials and precedents'.⁸³ This is how Wheatley understands the 'political conception' of human rights: 'an act of political will formation'.⁸⁴

However, the question of how exactly one should manage disagreement is peripheral to the main challenge that Wheatley poses to the Court's predominant methodology. The core of the argument is *minimally procedural*: while human rights norms are debated within the domestic

⁸⁰ This term is owed to Samantha Besson. 'Jurisdictional subsidiarity' is one dimension of subsidiarity in the context of the Court. In addition, 'interpretive subsidiarity' refers to the allocation of the margin of appreciation and 'remedial subsidiarity' to the freedom left to state party to choose how to execute its conventional obligations. Finally, 'remedial subsidiarity' refers to the freedom left to states to choose how to execute their conventional obligations. See in particular Samantha Besson, 'European Human Rights, Supranational Judicial Review and Democracy - Thinking Outside the Judicial Box,' in Patricia Poepelier, Catherine Van de Heyning, and Piet Van Nuffel (eds.), *Human Rights Protection in the European Legal Orders: Interaction Between European Courts and National Courts* (Cambridge: Cambridge University Press, 2011).

⁸¹ Wheatley, 'On the Legitimate Authority of International Human Rights Bodies,' 100.

⁸² Ibid, 105.

⁸³ Ibid, 106.

⁸⁴ Ibid, 104.

legal and political sphere like other public norms, the judicial methodology of the Court to resolve cases is not: ‘the problem lies in the seeming absence of any parallel political discourses, in contrast to the position within the State, as international human rights law regimes do not provide a formal public space for political deliberation’.⁸⁵ Given this basic democratic-procedural desideratum, Wheatley argues that the Court *should* be responsive to the democratic specification of those rights by national courts: ‘the function of IHRBs is not to give expression to moral rights, i.e. inherent rights we possess simply by virtue of ‘being human’, but to give expression to the overlapping consensus of the subjects of the regime on the issue of human rights’.⁸⁶ There is no way in which the Court can ‘know better’ about the content and scope of the Convention rights: ‘the political culture of the democratic States, i.e. the way in which political debate is conducted within democratic society, is not sympathetic to any claim to ‘know better’ by an actor or institution on issues of social, economic and political controversy, i.e. where there is disagreement (...)’.⁸⁷

Bellamy’s defense of weak review

As explained above, Wheatley constructs a normative(-Rawlsian) account of the Court’s interpretive methodology but does not question the Court’s established function. In contrast, Bellamy’s account aims to restrict the Court’s very function to a form of weak review. While Wheatley starts from the current practice of IHRBs (e.g. the Court’s predominant methodology) and then asks how those could be granted legitimate authority, Bellamy proceeds by re-casting his framework of political constitutionalism and then assesses the extent to which it is compatible with the judicial powers conferred to the Court.

Therefore, to understand Bellamy’s case for weak review is to understand the core of the case for political constitutionalism. As for Wheatley (and Christiano), Bellamy assumes that judges as individuals are cognitively biased and may reasonably disagree over the content and scope of rights. But Bellamy draws a distinctive implication pertaining to the allocation of political authority when there is disagreement: ‘to the extent that these judicial disagreements reflect difference of opinion among the population as a whole, their resolution should ultimately rest with legislatures that are elected and decide themselves on the basis of majority rule’.⁸⁸ This is because the resolution of disagreement is more democratic when it applies to the whole population (or at least their parliamentary representatives) – it better respects ‘the need for equal consideration of the views and interests of citizens’.⁸⁹ This entails that the parliamentary scrutiny of rights should be prioritized over judicial scrutiny. Bellamy’s case therefore converges with Wheatley and Christiano about the possibility of reasonable disagreement about the content and scope of rights, on the one hand, and about the need to equally address the interests of all subjects in the democratic process, on the other. Yet Bellamy’s fundamental skepticism towards the entrenchment of rights (‘the procedural-substantive distinction proves impossible to maintain’⁹⁰) demarcates political constitutionalism from both Wheatley’s Rawlsian framework and from Christiano’s egalitarian argument for democracy. I come back to this crucial point below.

⁸⁵ Ibid, 108.

⁸⁶ Ibid.

⁸⁷ Ibid., 103.

⁸⁸ Bellamy, ‘The Democratic Legitimacy of International Human Rights Conventions,’ 1025.

⁸⁹ Ibid., 1029.

⁹⁰ Ibid., 1026.

This leads to reforming the process of supranational human rights review in at least two respects that matter for our endeavors. First, only basic rights ought to be subject to the Court's scrutiny:

‘contestation ought to be limited to cases where domestic political and judicial avenues have been exhausted and only those rights that are considered basic to each citizens within a given polity being able to publicly advance their interests on equal terms with others (...).’⁹¹

Bellamy however neither identifies those rights nor explains how the Court should conduct its review. Second, the priority assigned to parliamentary sovereignty entails that ‘the possibility of overriding an IHRCt judgement must also exist, with such decisions resting with a consensus among the representatives of the democratic governments, who should be ultimately charged with monitoring state compliance with the Court's ruling’.⁹² Article 46 is here targeted. However, the fact the Court cannot strike down domestic laws – its role is simply *declaratory* – leads Bellamy to conclude that the Court ‘could be described as applying a ‘soft version’ of strong review’.⁹³ One may add here that state parties also benefit from ‘remedial subsidiarity’⁹⁴ – that is, they can choose how to respond to the Court's judgement.

Assessing objections and rival views

Wheatley and Bellamy's accounts are relevant to my own investigation because they assume the central premise of the egalitarian argument for democracy, namely disagreement and cognitive bias in collective deliberation. Further, they both assume that the very legitimacy of the democratic procedure depends on equally addressing the interests of all subjects in that discussion. They therefore overlap in acknowledging that the Court's protection of some basic rights is necessary to the procedure if domestic legal and political systems fail to do so. The two accounts however diverge, as we have seen, in their critique of the Court's authority – Wheatley's focuses on the method for deriving the *content* adduced to the rights while Bellamy's extends to the Court's basic *function*. But one may wonder if one missing step of their investigation is a more careful reconstruction of the Court's case law – especially if both accord (some limited) legitimacy to the Court's function.

Indeed, both authors do not investigate the Court's case law in great detail and thereby fail to assess *if, how, and to what extent* the Court may justify its interpretive authority on the democratic considerations they take as central to their own normative accounts. True, they refer to seminal or famous cases of the Court (Wheatley and Bellamy), mention the margin of appreciation (Wheatley and Bellamy) or the predominant doctrines of the Court (Wheatley). But there is no systematic examination of the predominant reasons given by the Court to ground, extend, restrict or balance rights. Nor do they differentiate between rights. This is surprising because the Court's adjudication is *ad hoc* and right-based. Moreover, if they mention the margin of appreciation, they fail to explain to which rights the device applies and

⁹¹ Ibid., 1034.

⁹² Ibid.

⁹³ Ibid., 1037.

⁹⁴ Besson, ‘European Human Rights, Supranational Judicial Review and Democracy - Thinking Outside the Judicial Box.’

for what reasons. Bellamy praises the device⁹⁵ but does not reconstruct where and to what rights it applies. Wheatley in turn mentions the margin of appreciation only in a footnote.⁹⁶ This is surprising because the breadth of the Court's adjudication is supposed to justify his 'democratic' objection in the first place. Further, pointing to the Court's teleological approach then constructing a normative account of judicial review should lead to the question *whether* and *how* the Court applies that same doctrine to Court's 'democratic society' given the governing role the notion plays in the reasoning.

My legal-empirical inquiry on the Court's 'democratic society' shows that, as far as Articles 8-11 are concerned, the Court justifies its interpretive authority by asserting the basic procedural and substantive criteria of democratic legitimacy that those authors employ to examine and question the Court's authority. It must be recalled, however, that my adoption of Christiano's egalitarian argument is sufficient to emphasize specific rights, duties and duty-bearers that serve the equal advancement of interests in the democratic process – a list that Bellamy's view, given its rejection of the procedural-substantive distinction, may be at pain with (although his view partly relies on Christiano's). This being said, Bellamy does allow judicial scrutiny for those rights considered 'basic to each citizens within a given polity being able to publicly advance their interests on equal terms with others (...)'.⁹⁷ If one takes Christiano's emphasis on freedom of expression as one of those basic rights, then one can conclude that the Court's 'democratic society' (the derived duties and duty-bearers) coheres with the egalitarian argument and therefore that the Court reinforces the democratic process in state parties rather than interferes with it. This is also valid for how the Court arbitrates conflicts of rights and for how it allocates the margin of appreciation, as we have seen.

Now, does the Court's substantive conception of 'democratic society' lead to adopting what George Letsas has termed a 'moral reading' of the Convention's rights? In a notable article, Letsas argues that 'the Court's interpretive ethic became one of looking at the substance of the human right as issue and the moral value it serves in a democratic society, rather than engaging in linguistic exercises about the meaning of words or empirical searches about the intentions of the drafters'.⁹⁸ Like Wheatley, Letsas concentrates on the range of interpretive doctrines that the Court has created and developed and that dismiss conventional doctrines of adjudication (e.g. literalism, originalism, intentionalism, consensualism, etc.). My reconstruction of the Court's 'democratic society' nuances this view on two important points. First, while it is correct that the Court captures the normative role of those rights in a 'democratic society', the same point does not apply to all the Convention's rights – in particular, those on which the Court has tended to accord a wide margin of appreciation. As we have briefly seen, the Court has not specified what it takes to be a sufficiently strong manifestation of a religious belief (under Article 9 (freedom of thought and religion)) regularly invokes the lack of a pan-European standard. Letsas does not specify which rights (and which duties and duty-bearers) the moral reading is concerned and what reasons the Court gives for it.

Second, Letsas does not only hold that the Court has adopted a moral reading of rights. He also argues that the Court's very purpose is 'to discover, over time and through persuasive

⁹⁵ Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions,' 1036.

⁹⁶ Wheatley, 'On the Legitimate Authority of International Human Rights Bodies,' footnote 55.

⁹⁷ Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions,' 1034.

⁹⁸ Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer,' 520.

moral argument, the moral truth about these fundamental rights’.⁹⁹ Now, Letsas convincingly shows that the Court has progressively dismissed a range of positivist doctrines of adjudication. But that finding alone does not necessarily imply that the Court is searching and discovering the moral *truths* of rights.¹⁰⁰ My inquiry on the governing role of the Court’s ‘democratic society’ reveals that the Court’s substantive reasoning centers on the public equality of individuals in a political community. This premise is certainly deontological in kind. Yet deontological statements are not necessarily moral truths. This is because the concept of moral truth implies – if taken seriously – reporting independent facts (in light of which moral statements are true or false).¹⁰¹ But nothing in the text of the Court’s judgments demonstrates that the Court reports facts of that kind. In fact, judges could agree on the deontological premise of public equality while diverging about the ultimate moral foundations of that status. In a more recent contribution focused on the Court’s evolutive doctrine of interpretation, Letsas further suggests that

‘The Convention is meant to protect whatever human rights people *in fact* have, and not what human rights domestic authorities or public opinion *think* people have. As a result, a better understanding of the nature of human rights and the principles that justify them will require an evolving interpretation of the Convention’.¹⁰²

Here again, one can admit that anti-majoritarianism is a core structural feature of rights (human or just individual). One may then imply that such feature dismisses, in principle, methods of adjudication based on utilitarian or majoritarian considerations (*in* one or *between* state parties to the CoE). But one may here again wonder if anti-majoritarianism *per se* implies that the Court’s reasoning amounts to finding moral truths. Moreover, my point does not limit the Court’s deontological reasoning when it reviews cases and develops its case law. Rather than a quest for moral truths, the Court searches for the duties (e.g. the Court’s positive duty of providing ‘plural perspective’) and duty-bearers (e.g. the press, political parties, scientists and intellectuals, etc.) that serve the realization of this basic equality in the conditions of deep pluralism.

6. Conclusion

I started this article by noticing the radical shift of perspective on the place of democracy in the political discourse surrounding the Court. While this fact is often neglected, democracy initially constituted the impetus towards the establishment of an ‘alarm bell’ mechanism against the return of totalitarianism. Today, in contrast, democracy is increasingly employed as normative standpoint to assess its Court’s ‘democratic’ performance. This exercise is legitimate simply because the domestic institutions support the ideal of democracy, human

⁹⁹ Ibid., 540.

¹⁰⁰ On this point, see in particular Alain Zysset, ‘The Judge at the European Court of Human Rights: ‘Moral Reading’ of Human Rights or Just ‘Reading of Moral Rights’? A Critique of Letsas,’ in *The Judge in International and European Law*, ed. Samantha Besson and Andreas Ziegler (Zurich: Schulthess, 2013), 281–99.

¹⁰¹ Following Peter Railton’s classical definition, the realists’ ‘generic stratagem’ is to ‘postulate a realm of facts in virtue of the contribution they would make to the *a posteriori* explanation of certain features of our experience’. In Peter Railton, ‘Moral Realism,’ *The Philosophical Review* 95, no. 2 (1986): 171–172.

¹⁰² George Letsas, *The ECHR as a Living Instrument: Its Meaning and Its Legitimacy*, in *The Legitimacy of International Human Rights Regimes*, ed. Andreas Follesdal, Johan Karlsson. Schaffer, and Geir Ulfstein (Cambridge: Cambridge University Press, 2013), 124.

rights and the rule of law have significantly developed within state parties over the last decades. The adoption of human rights treaties, the translation of those norms into domestic legal orders (by legislative act or direct effect) and their integration in public deliberation count among those developments. The normative theory of democracy has also developed and offers conceptual and normative resources to address the foundations and limits of rights. In those conditions, how can the Court's adjudication can be reconciled with the democratic-procedural standards by which state parties decide about the content and scope of human rights norms has become a vexing question.

In this article, I tried to add a layer of considerations to this on-going debate that can offer a new perspective on the Court's 'democratic performance'. More precisely, I suggested revisiting our understanding of the Court's interpretive role by investigating its 'democratic society'. This implied, first, capturing its location in the review, its crucial role in finding a violation and the range of rights that it governs. I hope to have shown that the Court's 'democratic society' has become the normative grounding of the Convention's political rights. The positive duty of pluralism, more precisely, is the connecting thread in the case law. Pluralism operates not only in the grounding of right, but also helps the Court identifying prominent duties and duty-bearers such as the press in the case of Article 10. Because the Convention is a brief, abstract and indeterminate document, it is unlikely that one can reconstruct the breadth of 'democratic society' irrespective of the specific cases in which deployed. This is why I addressed Article 10, Article 11 and Article 3 (Protocol 1) separately before reconstructing their underlying relations. This step is in my view necessary to render justice to the development of the Court's case law.

Second, I explained how the Court's 'democratic society' can be supported by the egalitarian argument in democratic theory. In short, the Court's insistence on protecting divisive views and promoting contradictory debates helps fostering the egalitarian conditions of the democratic procedure. The search for public equality is not only procedural but also substantive. As exemplified in conflicts of rights, the Court interferes is justified when state parties 'democratically' violate public equality. Obviously, my analysis is confined to the predominant reasoning of the Court on the 'qualified rights' of the Convention and does not incorporate other provisions. However, the restriction clauses imply that the Court enjoys more interpretive freedom on those rights than others – the same freedom that raises the legitimacy question. Therefore, I believe that how the Court has specified their content should be carefully addressed in reflecting on its normative legitimacy vis-à-vis state parties.

Finally, I showed what my investigation can change to current debate on the democratic legitimacy of the Court's authority. The implications are significant. I showed that the Court's critics adopt a normative framework – Wheatley's self-government conception of democracy and Bellamy's political constitutionalism – whose basic and central tenets are actually invoked and developed by the Court in exercising its interpretive authority. This led me to the conclusion that rather than interfering with the democratic process in state parties, the Court's authoritative role amounts to reinforcing and consolidating that same process.